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NO. 88-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, AND DONALD MAYFIELD,

Defendants/Petitioners,
v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

BRIEF AMICUS CURIAE OF THE VIRGINIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The Virginia School Boards Association ("VSBA") is an association

formed pursuant to Va. Code Ann. §15.1-20 to promote the interests and welfare of the school boards of the Commonwealth of Virginia. VSBA's membership is composed solely of school boards, which are political subdivisions of the Commonwealth. Every school board in the Commonwealth, numbering one hundred and thirty, is a member of VSBA.

Approximately ten percent of all students enrolled in the public schools in Virginia are identified as handicapped. This decision affects the placement procedures to be utilized for all of these handicapped students. The interpretation of placement procedures under the Education of All Handicapped Children Act ("EHA"), 20 U.S.C.

§§1401, et seq., is a very basic aspect of special education procedures. Accordingly, the effects of the decision in this case will have far-reaching implications for the operations of school systems.

It is the position of VSBA that the decision by the Fourth Circuit in this case cannot be implemented due to an internal inconsistency in its holding. VSBA further believes that the decision is contrary to the express terms of the federal regulations enacted under EHA. Finally, VSBA is convinced that the ruling by the Fourth Circuit will not serve the interests of handicapped children in Virginia. For these reasons, VSBA files this brief amicus

curiae in support of the petition for the granting of a writ of certiorari.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this matter must be reversed because it incorrectly interprets the meaning of the term placement and the placement regulations under EHA. Placement is the level of services to be provided to a particular handicapped child and not the selection of a particular school. Furthermore, there is no means by which school boards can comply with the Fourth Circuit's decision because of the internal inconsistency in its holding which requires a predetermination of placement in every case, yet holding

that in the case of public placements, such a determination is procedurally flawed. Finally, VSBA is concerned that to give effect to the holding of the Fourth Circuit will cause delays in the implementation of an IEP and promote mistrust between the parents and school divisions thereby hampering the education to be provided to a handicapped child.

ARGUMENT

I.

THE DECISION OF THE FOURTH CIRCUIT IS INTERNALLY INCONSISTENT IN THAT TO GIVE EFFECT TO ITS HOLDING REQUIRES THAT A PREPLACEMENT DETERMINATION BE MADE IN EVERY CASE WHILE PROHIBITING THE MAKING OF THAT SAME DETERMINATION.

The Fourth Circuit held that

Henrico County violated EHA's procedures by predetermining placement prior to the development of the individualized education plan ("IEP"). App. 13-14. The action on the part of Henrico County was held sufficient to invalidate the IEP. The decision specifically authorizes, however, such a preplacement determination for placements made in private schools. A distinction was drawn by the Fourth Circuit between procedures to be utilized for placements made in public schools and those made in private schools. The court viewed private school placements to be an exception to the general rule prohibiting placement decisions being made prior to development of the IEP. The

exception was recognized by the Fourth Circuit because of the regulatory requirement that a representative of the private school be present at the IEP meeting if placement is to be made in a private school. 34 C.F.R. §300.347(a)(2). Obviously, to comply with that regulatory dictate requires the placement to be determined in advance of the IEP meeting.

The Fourth Circuit went on to prohibit this determination of placement prior to development of the IEP in the case of public school placements. This holding is internally inconsistent. In order to give effect to this decision, a decision on placement must be made in advance of the development of the IEP in

every case. An initial pre-IEP decision must be made as to whether the placement will be in a public or private program. Under the ruling of the Fourth Circuit, if the determination were made that the placement should be private, no procedural violation would result because the exception applies. If, however, that determination results in the selection of a public program, which the Fourth Circuit recognized would be the result in the majority of cases, the making of that determination would be a procedural violation. The resulting IEP would then be procedurally flawed and invalid without further inquiry.

To let the decision stand will cause confusion in the school systems.

It is believed that the confusion that is engendered could not serve the interests of the handicapped child.

II.

EHA DOES NOT PROHIBIT DETERMINING PLACEMENT IN ADVANCE OF DEVELOPMENT OF THE IEP.

The illogical approach to placement decisions that results from the decision of the Fourth Circuit is due to a misunderstanding of the placement procedures of EHA. The regulations which have been misconstrued and which formed the basis for the decision of the Fourth Circuit neither expressly nor implicitly prohibit a determination of placement prior to the development of the IEP. The regulations very logically

provide that an IEP must "be in effect before special education and related services are provided to a child." 34 C.F.R. §300.342(b)(1). Additionally, further provisions make clear that placement must be based on the IEP. 34 C.F.R. §300.552(a)(2). No prohibition is expressed on determining placement prior to IEP development.

An IEP serves as a blueprint of the special education services that a handicapped child needs in order to receive an appropriate education. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). Those services must be specified in advance of putting the child in a special education program;

otherwise, the handicapped child might receive too few services or too many and not be educated in the least restrictive environment. When the statement is made in the regulations that placement is made based on the IEP, it means simply that no more services and no fewer services are to be provided than are specified in the IEP and that the IEP must already have been determined.

This view is predicated on the opinion that placement, rather than being defined as the selection of a particular school, is really the determination of the level of special education services to be provided to a

handicapped child.[1] There is no specific definition of placement contained in the EHA or its regulations; however, support for this approach to the concept of placement as a program of services is found in the regulations. In discussing the dictate that a continuum of alternative placements be available, the continuum is defined to include "...instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions" and "...supplementary services (such as

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[1] In its opinion, the Fourth Circuit erroneously viewed Melmark and Virginia Randolph Special Education Center as placements rather than the program specified in the IEP. The Court did not address the level of services provided in the IEP.

resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 C.F.R. §300.551. By defining the types of placement to be provided as synonymous with these examples in the continuum of placements, it is made clear that placement is the type of educational program and not a particular school. The Fourth Circuit throughout its decision erroneously viewed placement as being specific schools rather than the program of services defined in the IEP. Decisions in other circuits address placement under EHA in terms of the level of services and not to the actual school selected. See e.g., Lachman, et al. v. Illinois State Board of Educa-

tion, et al., 853 F.2d 290 (7th Cir. 1988) (wherein placements were discussed in terms of level of services - regular education versus self-contained); Digre v. Roseville Schools Independent District No. 623, 841 F.2d 245 (8th Cir. 1988) (current educational placement was in a special education program and not in regular education); and S-1 v. Turlington, 635 f.2d 342 (5th Cir. 1981) (termination of special education services is a change in placement).

Abandoning the Fourth Circuit's approach to placement, it is obvious that placement must be considered in advance of writing the IEP. IEP is a defined term. 20 U.S.C. §1401(19). A statement of the specific educational

services to be provided to the handicapped child is required to be included in the IEP. Id. This factor can only be appropriately addressed in the IEP by determining the level of services in advance of drafting the IEP. Thus, placement is appropriately handled in advance of, or in conjunction with, the development of the IEP. It cannot be appropriately specified after IEP development.

III.

DELAYING A DETERMINATION OF PLACEMENT UNTIL AFTER THE IEP MEETING WILL HAMPER EFFORTS TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO HANDICAPPED STUDENTS.

Placement is an issue of extreme importance to parents throughout the IEP

process. This fact is evident in that in most cases, the parents' initial request for special education services also encompasses a request for particular special education services. In other cases, the parents frequently ask about placement options and are referred by special education personnel to observe specific programs which may be appropriate while the evaluation and IEP processes are ongoing. A placement (meaning program) is then selected and given effect in the IEP. School divisions will now be reluctant to engage in such an exchange for fear the actions will be viewed as a predetermination of placement.

Parents are intimately involved in

placement determinations during the IEP process because they can then indicate their desires for the level of services they believe to be appropriate. The IEP will be developed to reflect the joint desires of the parties. Where the parents and school system disagree, the school decision will have an obligation to advise the parents of their right to appeal through a due process hearing conducted pursuant to 20 U.S.C. § 1415(e)(2). In order to follow the decision of the Fourth Circuit, school boards will need to refuse to discuss placement with the parents prior to completion of the IEP. This refusal will be required even when the parents are requesting such discussions in order

to avoid any appearance of predetermination of placement by the school division. This approach can only cause parents to be resentful of school divisions and will be viewed as delaying tactics. In fact, implementation of the IEP will be delayed if placement can only be explored and determined after IEP development. The handicapped student for whom it has been determined the special services are required will be the one to suffer from any delays.

CONCLUSION

For these reasons, it is requested that a Writ of Certiorari be issued to reverse the Fourth Circuit's decision

on the procedural violations.

Respectfully submitted,

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